

STATE OF MICHIGAN
COURT OF APPEALS

WILLIE MCCORMICK & ASSOCIATES, INC.,

Plaintiff-Appellant,

v

L. D'AGOSTINI & SONS, INC.,

Defendant-Appellee.

UNPUBLISHED

May 19, 2005

No. 252941

Wayne Circuit Court

LC No. 02-217498-CZ

WILLIE MCCORMICK & ASSOCIATES, INC.,

Plaintiff-Appellant,

v

CITY OF DETROIT and L. D'AGOSTINI &
SONS, INC.,

Defendants-Appellees.

No. 253283

Wayne Circuit Court

LC No. 00-011283-CZ

Before: Neff, P.J., and Owens and Fort Hood, JJ.

PER CURIAM.

In this action for tortious interference with an advantageous business expectancy and imposition of a constructive trust, plaintiff appeals as of right from the trial court's order granting summary disposition to defendant L. D'Agostini & Sons, Inc., under MCR 2.116(C)(10), and dismissing plaintiff's complaint. We affirm.

Plaintiff argues that there were questions of material fact precluding summary disposition of its claim of interference with an advantageous business expectancy. We disagree.

A trial court's grant of summary disposition is reviewed de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994). When reviewing a motion under MCR 2.116(C)(10), a court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether there is a genuine issue of material fact for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996).

As this Court observed in *Mino v Clio School Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003):

“The elements of tortious interference with a business relationship are the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff.” [Quoting *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996), citing *Lakeshore Community Hosp v Perry*, 212 Mich App 396, 401; 538 NW2d 24 (1995).]

To show the requisite interference, the plaintiff must show either “the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the . . . business relationship of another.” *CMI Int’l, Inc v Internet Int’l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002), quoting *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984). However,

[t]o establish that a lawful act was done with malice and without justification, the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference. *Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.* [*Mino, supra* at 78, quoting *BPS Clinical Laboratories, supra* at 698-699 (emphasis added).]

See also *CMI Int’l, Inc, supra* at 131.

Plaintiff alleges that defendant was not eligible to be awarded the construction contract because it was improperly certified as a Small Business Enterprise (SBE) in September 1998. It is undisputed that, to be certified as an SBE, a business engaged in “general construction” must have average annual gross receipts for the three fiscal years preceding the application of no more than \$17 million. Plaintiff notes that, instead of examining defendant’s records for 1995 through 1997, the city examined defendant’s records for 1994 through 1996. However, as plaintiff’s own calculations show, even when the income level disclosed in defendant’s 1997 tax return is considered, defendant’s three-year average gross income for 1995 through 1997 is less than \$17 million dollars. Thus, this argument has no merit.

Plaintiff alleges that, by May 1999, when defendant bid on the contract, its average gross revenues for the previous three fiscal years (1996 through 1998) exceeded \$17 million. By the time defendant was awarded the contract, in March 2000, its average gross revenues for the previous three years had increased even more. Plaintiff argues that defendant should have been disqualified from the contract because it violated its duty to inform the city of these increases, which materially affected its qualification for SBE status. Plaintiff argues that, if defendant had informed the city of its true revenues, it would have been disqualified, and plaintiff would have been awarded the contract instead as the next lowest bidder.

Correspondence generated during the certification and recertification process shows that, contrary to plaintiff’s unsupported allegations, defendant provided all relevant financial

information, including information pertaining to its affiliated companies. The correspondence shows that, in 1998 and 2000, defendant asked the city not to consider income generated by E & L Development, Inc. (E&L), in computing defendant's average gross income because, as a division, E&L's income was already included in defendant's income and reported in defendant's tax returns. Additionally, defendant asked the city not to consider any income earned by Quadrate Development, L.L.C. ("Quadrate"), because Quadrate operated in an unrelated field, real estate development, and was related to defendant only by virtue of being owned by the same persons.

As plaintiff's calculations show, if the income generated by E&L and Quadrate was included, defendant's average gross income would exceed \$17 million during the three-year periods of 1996 through 1998, and 1997 through 1999. However, because defendant was recertified as an SBE in November 2000, the only reasonable inference is that the city agreed to exclude E&L's and Quadrate's income. Using only the income generated by defendant and its remaining affiliate, D-4 Enterprises, Inc. ("D-4"), defendant's yearly gross income levels for 1996, 1997, 1998, and 1999 were as follows:

	<u>1996</u>	<u>1997</u>	<u>1998</u>	<u>1999</u>
D'Angostini	\$15,503,237	\$12,430,977	\$11,604,758	\$18,621,704
D-4	\$269,162	\$502,698	\$265,698	\$177,187
Totals	\$15,772,399	\$12,933,675	\$11,870,456	\$18,798,891

Thus, the resulting three-year totals and averages of these income levels were:

Three-Year Totals	\$40,576,530 ('96-'98)	\$43,603,022 ('97-'99)
Three-Year Average	\$13,525,510 ('96-'98)	\$14,534,341 ('97-'99)

Therefore, excluding the income generated by E&L and Quadrate, it is clear that defendant did not exceed the \$17 million average gross income ceiling for the previous three years, either in 1999, when it bid on the contract, or in 2000, when it was recertified. Accordingly, plaintiff failed to show that defendant violated its obligation to disclose material facts in 1999 or 2000, or that it was improperly certified or recertified as an SBE.

We additionally find no evidence that defendant intentionally committed a per se wrongful act sufficient to support an action for interference with an advantageous business expectancy. Nor has plaintiff shown that, in seeking to be certified and recertified as an SBE, defendant acted with malice or without justification, or for the purpose of interfering with plaintiff's alleged business expectancy. See *CMI Int'l, Inc.*, *supra* at 131. Instead, the undisputed evidence shows that defendant's actions in seeking SBE certification and recertification, including asking the city not to include the income generated by E&L and Quadrate for purposes of determining its qualification for SBE status, were lawful acts motivated by legitimate business reasons, i.e., defendant's desire to qualify for city construction contracts. There is no evidence of specific affirmative acts corroborating defendant's alleged wrongful purpose. See *Mino*, *supra* at

78. Therefore, plaintiff failed to establish that a question of material fact existed concerning whether defendant interfered with plaintiff's alleged business expectancy.

Plaintiff alleges that defendant committed a wrongful act by failing to submit a subcontractor data form with its bid. As argued by plaintiff, Finance Directive No. 134, p 13, § 7.01, requires that general construction contractors who wish to subcontract any part of a contract complete a form identifying their subcontractors and their certification status, and submit the form with their bid. According to plaintiff, defendant improperly subcontracted all of the labor on its jobs to E&L, which is not independently certified as an SBE or DBE.

It is undisputed, however, that in 1998 and again in 2000, during the certification and recertification process, defendant informed the city that E&L was its "prime" subcontractor for construction labor services. There is no evidence that defendant subcontracted all its labor to E&L. Moreover, Head Government Analyst Daryl Latimer testified that contractors are no longer required to submit the subcontractor data form with their bid because, at that stage, most contractors do not know whether they will subcontract all or part of the job, or to whom. Additionally, he disagreed with plaintiff's claim that only SBE or DBE certified subcontractors could be used. Rather, if the contractor was certified and performed at least thirty percent of the work, it could subcontract to anyone. In any event, plaintiff has again failed to show that defendant committed a per se wrongful act, or a lawful act committed with malice for the purpose of interfering with defendant's alleged business expectancy. The trial court properly granted defendant's motion for summary disposition.

Plaintiff also argues that the trial court erred in dismissing its claim for imposition of a constructive trust. We disagree.

"A constructive trust may be imposed 'where such trust is necessary to do equity or to prevent unjust enrichment . . .'" *Kammer Asphalt Paving Co v East China Twp Schools*, 443 Mich 176, 188; 504 NW2d 635 (1993), quoting *Ooley v Collins*, 344 Mich 148, 158; 73 NW2d 464 (1955). "Hence, such a trust may be imposed when property "'has been obtained through fraud, misrepresentation, concealment, undue influence, duress, taking advantage of one's weakness, or necessities, or any other similar circumstances that render it unconscionable for the holder of the legal title to retain and enjoy the property.'"" *Kammer Asphalt Paving Co, supra* at 188, quoting *Potter v Lindsay*, 337 Mich 404, 411; 60 NW2d 133 (1953), quoting *Racho v Beach*, 254 Mich 600, 606-607; 236 NW 875 (1931).

As argued by defendant, a constructive trust is clearly a remedy imposed after a plaintiff prevails on its principal cause of action. Here, the trial court found that defendant was entitled to judgment on the only cause of action asserted in plaintiff's complaint. Therefore, the trial court properly dismissed plaintiff's request for imposition of a constructive trust.

Affirmed.

/s/ Janet T. Neff
/s/ Donald S. Owens
/s/ Karen M. Fort Hood